

The sole issue for Board review is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

In summary, claimant, a 30-year employee, was injured when in the course of his employment as a corrections officer he and another officer broke up a fight between two juvenile offenders. Claimant first complained of shoulder pain but within three days he also had back complaints. Ultimately, claimant had two back surgeries after the incident.

Initially, respondent attacks claimant's credibility and argues that the emergency room record does not indicate claimant's altercation was as severe as his later testimony depicted the incident. The medical records consistently indicate a history that claimant was injured restraining a juvenile. And Dr. Stein agreed that emergency room records do not always have a detailed history of the incident. Simply stated, claimant's more detailed testimony describing the incident was not contradicted. Another officer was involved in the incident but did not testify to rebut claimant's version. The ALJ found claimant credible and the Board agrees.

Respondent next argues claimant only complained of shoulder pain following the incident. Although claimant initially only complained of shoulder pain, he testified that his back pain started shortly after the incident. The physicians agreed that back injuries sometimes manifest pain at a later time. And in this case, claimant was complaining of back pain within three days of the incident. Moreover, the testifying physicians agreed claimant suffered permanent impairment to his back as a result of the work-related accident.

Respondent argues claimant did not qualify for a permanent total disability because he did not make a good faith effort to find employment after his injury and it cannot be said his permanent total disability is on account of his injury. The Board disagrees.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other

causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.¹

In *Wardlow*², the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

In this case claimant was a corrections officer for 30 years and is now physically impaired. The ALJ's Award, on page four, details claimant's current condition. Dr. Stein placed permanent work restrictions on claimant of: (1) no lifting more than 25 pounds with any single lift up to twice per day, 15 pounds occasionally, and 10 pounds more often but not continuously; (2) no lifting from below knuckle height or above chest height; (3) no repetitive bending and twisting of the lower back; (4) avoid situations which might result in physical altercation; and, (5) alternate sitting with standing and walking as needed. Dr. Zimmerman placed permanent restrictions on claimant: (1) no lifting greater than 10 pounds on an occasional basis and 5 pounds on a frequent basis; (2) no frequent flexing of the lumbosacral spine; and, (3) no frequent bending, stooping, squatting, kneeling and twisting activities at the lumbar level. The doctor also opined that claimant would need to change positions approximately every 15 minutes, only stand for 5 minutes and also walk approximately 3 blocks.

Dick Santner, a vocational rehabilitation counselor, opined that claimant is not capable of engaging in substantial, gainful employment based upon the restrictions of Dr. Zimmerman. Dr. Zimmerman reviewed the list of claimant's former work tasks prepared by Mr. Santner and concluded claimant could no longer perform 13 of the 13 tasks for a 100 percent task loss. And Dr. Zimmerman further opined that claimant is not capable of engaging in substantial, gainful employment.

Claimant's lack of transferable skills, constant pain, usage of narcotic medication and the necessity of changing his body positions are consistent with the circumstances that *Wardlow* indicated were pertinent to the decision whether claimant suffered permanent

¹ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

² *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

total disability. In this instance, the Board finds Dr. Zimmerman and Mr. Santner's opinions persuasive. Claimant has met his burden of proof to establish that he is permanently and totally disabled.

Respondent's also argues that claimant's failure to make a good faith effort to find employment precludes a finding of permanent total disability. A person who is permanently and totally disabled under Kansas workers compensation law, has no requirement to continue to look for work.³ As noted in *Herrera-Gallegos* a job search by someone who is incapable of engaging in substantial gainful employment is the very definition of a fool's errand. The Board affirms the ALJ's Award in all respects.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁴ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated December 14, 2011, is affirmed.

IT IS SO ORDERED.

Dated this 20th day of April, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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³ *Herrera-Gallegos v. H & H Delivery Service, Inc.*, 42 Kan. App. 2d 360, 212 P.3d 239 (2009).

⁴ K.S.A. 2010 Supp. 44-555c(k).